Supreme Court, U.S.
FILED
95-745 OCT 10 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JOSE MIGUEL ORTEGA-ACOSTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL H. FORMAN, P.A.
DANIEL H. FORMAN, ESQ.
1401 Brickell Avenue
Suite 800
Miami, FL 33131
(305) 577-8888
Attorney for Petitioner
Counsel of Record for Petitioner

MARISA TINKLER MENDEZ, P.A.
MARISA TINKLER MENDEZ, ESQ.
On brief for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the court below in this case and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993) have misconstrued the principles set forth by this Court in *Wade v. United States*, 504 U.S. 181 (1992), by expanding the necessity of showing an unconstitutional motive on the part of a prosecutor in failing to file a substantial assistance motion pursuant to 18 U.S.C. sec. 3553(e), 5K1.1 of the United States Sentencing Guidelines, and Rule 35(b) of the Federal Rules of Criminal Procedure, where there existed a written plea agreement between the parties, which contained a discretionary provision that the government would file a motion for downward departure or reduction of sentence based on the defendant's substantial assistance?

2. Whether the court below has misconstrued the principles set forth by this Court in *Wade v. United States*, 504 U.S. 181 (1992), thereby requiring this Court to review its earlier decision and clarify the application of the principles in *Wade*, since extending *Wade* to cases involving plea agreements would effectively conflict with earlier decisions of this Court and other decisions of the Courts of Appeals, which have consistently held that plea agreements are governed by contract principles, and therefore, the defendant need not allege or prove an unconstitutional motive by the prosecutor in failing to file a substantial assistance motion when a written plea agreement exists between the parties, but is entitled to relief if the prosecutor has acted in bad faith in not filing a substantial assistance motion, or the prosecutor's failure to file

QUESTIONS PRESENTED FOR REVIEW – Continued

this motion was not rationally related to any legitimate government end?

3. Whether the petitioner had still made the requisite showing under *Wade v. United States*, entitling him to specific performance of his plea agreement, where he alleged that the prosecutor acted in bad faith in refusing to file a substantial assistance motion for reduction of sentence or the prosecutor's actions were not rationally related to any legitimate government end? the motion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. Whether the opinion of the Court below in this case and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993) have erroneously misconstrued the principles set forth by this Court in *Wade v. United States*, 504 U.S. 181 (1992), by expanding the necessity of showing an unconstitutional motive on the part of a prosecutor in failing to file a substantial assistance motion pursuant to 18 U.S.C. sec. 3553(e), 5K1.1 of the United States Sentencing Guidelines, and Rule 35(b) of the Federal Rules of Criminal Procedure, where there exists a written plea agreement between the parties which contains a discretionary provision that the government would file a substantial assistance motion for downward departure or reduction of sentence? 10

TABLE OF CONTENTS – Continued

Page

II. Whether the Court below and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993) have misconstrued the principles set forth by this Court in *Wade v. United States*, 504 U.S. 181 (1992), thereby requiring this Court to review its earlier decision in *Wade* and clarify its application of the principles in that case, where extending *Wade* to cases involving plea agreements would effectively conflict with earlier decisions of this Court and decisions of other courts of appeals interpreting *Wade*, which have consistently held that plea agreements are governed by contract principles, and, therefore, in order to obtain judicial review, the defendant need not allege an unconstitutional motive by a prosecutor in his refusal to file a substantial assistance motion but can allege that the prosecutor acted in bad faith or that his actions were not rationally related to any legitimate government end? .. 14

III. Whether the petitioner had still made the requisite showing under *Wade v. United States*, entitling him to specific performance of his plea agreement, where he alleged that the prosecutor acted in bad faith in not filing the substantial assistance motion or where the prosecutor's actions were not rationally related to any legitimate government end? .. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Boykin v. Alabama, 395 U.S. 238 (1969) 15

Brady v. United States, 397 U.S. 742 (1970) 15

Santobello v. New York, 404 U.S. 257 (1971) 10, 11, 13, 15, 16, 18

United States v. Carrera, 49 F.3d 105 (3d Cir. 1995) 17

United States v. Catalucci, 36 F.3d 151 (1st Cir. 1994) 17

United States v. Conner, 930 F.2d 1073 (4th Cir.), *cert. denied*, 502 U.S. ___, 112 S.Ct. 420 (1991) 13

United States v. Dayton, 604 F.2d 931 (5th Cir. 1979) (en banc) 15

United States v. Doe, 940 F.2d 199 (7th Cir.), *cert. denied*, 502 U.S. 869 (1991) 11

United States v. Evans, 49 F.3d 109 (3d Cir. 1995) 17

United States v. Forney, 9 F.3d 1492 (11th Cir. 1993) 9, 10, 12, 13, 14, 16

United States v. Gangi, 45 F.3d 28 (2d Cir. 1995) 11

United States v. Jeffries, 908 F.2d 1520 (11th Cir. 1990) 16

United States v. Knights, 968 F.2d 1483 (2d Cir. 1992) 18

United States v. Jose Miguel Ortega-Acosta, Case No. 92-5122 (11th Cir. 1995) 13

United States v. Perez, 955 F.2d 34 (10th Cir. 1992) 11

United States v. Profeta, 995 F.2d 306 (D.C. Cir. 1993) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1855 (1993) 18

Wade v. United States, 504 U.S. 181 (1992) ..... *passim*

STATUTES

18 U.S.C. sec. 3553(e) 2, 10

28 U.S.C. sec. 1254(1) 1

OTHER AUTHORITIES

Restatement (Second) of Contracts sec. 205 (1981) 15

PETITION FOR WRIT OF CERTIORARI

The Petitioner, JOSE MIGUEL ORTEGA-ACOSTA, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the proceeding on May 12, 1995, affirming the District Court's denial of his motion to compel specific performance of his plea agreement.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished per curiam affirmed decision, *United States v. Jose Miguel Ortega-Acosta,* Case No. 92-5122 (11th Cir. 1995). A copy of the opinion is appended to this petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on May 12, 1995. A timely petition for rehearing and clarification was filed on June 1, 1995, and was denied on July 13, 1995. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States, provides:

Rights of the accused.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, section 3553(e), United States Code, provides:

> **Limited authority to impose a sentence below a statutory minimum.** – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of Title 28, United States Code.

STATEMENT OF THE CASE

The Petitioner, JOSE MIGUEL ORTEGA-ACOSTA was indicted on three occasions between the years 1987 and 1990 for offenses involving drug trafficking and bail-jumping. App. 34-41 One single plea agreement was entered into between ORTEGA and the government, which intent was to resolve all three cases. App. 28-33 The Assistant United States Attorney representing the government in the plea agreement was Karen E. Rochlin. Pursuant to his plea, ORTEGA was sentenced to a term of imprisonment of twelve (12) years, consolidating all three cases in June of 1991. App. 11-27

In June of 1992, ORTEGA filed a Motion to Compel Specific Performance of his Plea Agreement, wherein he argued that the government should be compelled to abide by the terms of the plea agreement that had been entered into between the parties, and file a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure based upon ORTEGA's having provided substantial assistance required by his plea.

Specifically, paragraph 7 of the plea agreement provides that ORTEGA agrees to cooperate fully with the United States Attorney, the United States Drug Enforcement Administration (DEA), the United States Customs Service, and other law enforcement agencies. App. 29-30

The plea agreement further specifically provides at paragraph 8:

> The United States reserves the right to evaluate the nature and extent of the defendant's cooperation and to advise the court of the nature and extent of such cooperation at the

> time of sentencing. If, in the judgment of the United States, the circumstances of the defendant's cooperation and applicable legal authority, if any, warrant a recommendation for concurrent sentences or reduction below the level established by statute as the minimum sentence and departure by the court from the guideline sentence, the government shall make a motion pursuant to Title 18, United States Code, Section 3553(e), and 5K1.1 of the Sentencing Guidelines, stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

App. 30.

Thereafter, a hearing was conducted regarding the plea agreement and ORTEGA's cooperation. He was represented by two attorneys, Simon Steckel and Ruben Oliva. At this hearing, counsel for ORTEGA discussed whether or not ORTEGA would be testifying as a witness in *United States v. Raul Gonzalez*, Case No. 90-1015-Cr-Aronovitz (Ryskamp). In this case, ORTEGA's family members had been charged with harboring him while he was a fugitive. The Assistant United States Attorney Rochlin, who was assigned to all cases involving ORTEGA and his family, explained during the hearing that the earlier substantial-assistance portion of the plea agreement was not based on the government's desire to have ORTEGA testify against his family in the harboring case, and the plea agreement was independent from the harboring of a fugitive case. Counsel for ORTEGA asserted that ORTEGA might be called as a defense witness in the harboring case, and both the trial court and

the Assistant United States Attorney acknowledged that the plea agreement was based on ORTEGA providing truthful testimony and being tru ıful to the government. The court further determined that since the government proclaimed that the harboring case was unrelated to ORTEGA's plea agreement, if the government called ORTEGA as a witness, he could withdraw his plea.

Two months later, in June of 1991, ORTEGA was sentenced. At the time of sentencing, ORTEGA's cooperation with the government had already commenced, and was made known on the record. Assistant United States Attorney Rochlin further acknowledged that ORTEGA had begun cooperating with the government, and had been debriefed about five times. She anticipated that ORTEGA would provide significant and substantial information and cooperation with the government.

A claim was made by AUSA Rochlin that sometime between April 16, 1991 and July 1, 1991 the attorney representing ORTEGA's family contacted her, and advised her that "ORTEGA would deny residing at the residence where he was arrested with his family." Other than this hearsay statement, made to her by another attorney, Rochlin had no information or personal knowledge whether or not ORTEGA was residing at the residence when arrested, or what ORTEGA would testify to if called as witness. AUSA Rochlin, in fact, admitted that she never objected to any attorney representing ORTEGA or his family concerning ORTEGA's potential testimony.

Thereafter, counsel for ORTEGA's family withdrew from representation in the harboring case, and ORTEGA's

counsel, Steckel, was retained by ORTEGA's wife to represent her in that case. Steckel was simultaneously representing ORTEGA's wife in the harboring case during the same time when he was representing ORTEGA in his case.

A hearing on the motion to suppress in the harboring case was scheduled for September 27, 1991. One day prior to the scheduled hearing, AUSA Rochlin telephoned attorney Ruben Oliva, who was co-counsel with Steckel in ORTEGA's case. Rochlin claimed that she telephoned Oliva because she believed that Steckel had a conflict of interest. She also inquired whether or not ORTEGA would testify at the suppression hearing in the harboring case. Oliva explained that he did not know if ORTEGA would testify, and stated that if he did, he would testify truthfully. Oliva noted in a later affidavit that he felt that Rochlin had made threats against ORTEGA, and, stated that if ORTEGA were to testify at the suppression hearing that he himself "might later regret losing the opportunity to cooperate with the government." She further noted in an affidavit that if ORTEGA testified for the defense, that "the government would have to impeach ORTEGA . . . generating possible *Brady* material, and *undermining his ability to receive a sentencing reduction.*" Rochlin also stated that ORTEGA was obligated to testify truthfully, and his failure to do so might result in his being charged with perjury. These threats were interpreted by Oliva to mean that if ORTEGA honored a defense counsel subpoena to testify in the harboring case that the government would refuse to live up to their bargain to file a Rule 35 motion on ORTEGA's behalf, this

despite his recognized ongoing cooperation with the government in a variety of matters. In fact, subsequent to ORTEGA's sentencing, but prior to the telephone call from Rochlin to Oliva, Special Agent Matt Leary had advised attorney Steckel that the government was satisfied and happy with ORTEGA's ongoing cooperation and assistance, and that ORTEGA was going to be a material witness in a case that was soon to be indicted.

In October or November of 1991, a Motion to Dismiss the Indictment based on prosecutorial misconduct was filed in the harboring case.[1] On November 15, 1991 a hearing was held on the Motion to Dismiss the Indictment in the harboring case. At that hearing, Oliva, one of ORTEGA's attorneys, was called as a witness, and reaffirmed and verified the conversation he had with Rochlin, and stated that due to that conversation, and Rochlin's "threats" that the government would not look favorably on ORTEGA if he testified for the defense in the harboring case, ORTEGA could no longer testify in the harboring case. However, ORTEGA had already been debriefed a number of times, and Oliva, who had attended many of the government's debriefings of ORTEGA, had never been told by the government that they thought ORTEGA was lying.

---

[1] Prior to the filing of the motion, United States Magistrate Judge Bandstra granted a defense motion to suppress evidence, which included the suppression of the fruits of the illegal search based on a lack of probable cause for agents to enter the house and conduct the search. The government did not appeal the Magistrate's order, but still decided to proceed with the case, despite the fact that most of the evidence regarding knowledge of harboring a fugitive had been suppressed.

Clearly, AUSA Rochlin knew at least five (5) months earlier that ORTEGA might be called as a witness for the defense in the harboring case, yet she never complained nor made any "threats" that this would, in any way, impact on his ability to obtain a substantial assistance motion from the government. Further, AUSA Rochlin never advised at any point during the litigation, that she or any agent of the government were unhappy or dissatisfied with ORTEGA's cooperation and assistance, and, in fact, acknowledged that he was cooperating with the government in a number of cases. Further, when AUSA Rochlin first heard of the possibility that ORTEGA might testify as a witness in the harboring case, Rochlin stated that the harboring case had nothing to do with ORTEGA's plea. Ultimately, the harboring case was resolved without ORTEGA's testimony.

Several months later, in the Spring of 1992, Steckel had independent conversations with Assistant United States Attorneys Mike Mullaney, (Mary) Jenna King and Special Agent Leary. Mullaney and King had writted ORTEGA back to Miami, Florida since they wished to use him as a witness in their independent prosecution. Agent Leary advised Steckel that he believed ORTEGA's cooperation was substantial and would ultimately lead to a Rule 35 motion being filed. Leary further advised Steckel that he believed that ORTEGA had been truthful and credible in his numerous debriefings, and further believed that Rochlin had been mistaken in her assessment of ORTEGA, as was reflected in her testimony during the prosecutorial misconduct hearing in the harboring case.

Thereafter, Steckel was advised that AUSA Rochlin had complained and obstructed ORTEGA's attempt to

continue to cooperate in these various other cases with the other Assistant United States Attorneys. He was further advised that Rochlin intended to prevent ORTEGA's further cooperation in these other cases, and would not file a Rule 35 motion for reduction of ORTEGA's sentence.

Thereafter, in June of 1992, ORTEGA filed the motion to compel specific performance of the plea agreement or for dismissal of the indictments. Without holding a hearing on the motion, the District Court denied the motion, basing its determination on an incorrect interpretation of this Court's decision in *Wade v. United States*, 504 U.S. 181 (1992). App. 5-10

The District Court order was appealed to the Eleventh Circuit Court of Appeals. The Court of Appeals, in an unpublished decision entered on May 12, 1995, foreclosed any relief to the Petition, determining that since the Petitioner had not alleged any unconstitutional motive on the part of the prosecution, he could not obtain specific performance of his plea agreement. The Court of Appeals relied on this Court's holding in *Wade* and in an earlier decision of the Court in *United States v. Forney*, 9 F.3d 1492, 1500-1503 (11th Cir. 1993). App. 3-4 The Petition for Rehearing and Rehearing en banc was thereafter denied on July 13, 1995. App. 1-2

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE OPINION OF THE COURT BELOW IN THIS CASE AND IN *UNITED STATES v. FORNEY*, 9 F.3d 1492 (11th CIR. 1993) HAVE ERRONEOUSLY MISCONSTRUED THE PRINCIPLES SET FORTH BY THIS COURT IN *WADE v. UNITED STATES*, 504 U.S. 181 (1992), BY EXPANDING THE NECESSITY OF SHOWING AN UNCONSTITUTIONAL MOTIVE ON THE PART OF A PROSECUTOR IN FAILING TO FILE A SUBSTANTIAL ASSISTANCE MOTION PURSUANT TO 18 U.S.C. SEC. 3553(e), 5K1.1 OF THE UNITED STATES SENTENCING GUIDELINES, AND RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WHERE THERE EXISTS A WRITTEN PLEA AGREEMENT BETWEEN THE PARTIES WHICH CONTAINS A DISCRETIONARY PROVISION THAT THE GOVERNMENT WOULD FILE A SUBSTANTIAL ASSISTANCE MOTION FOR DOWNWARD DEPARTURE OR REDUCTION OF SENTENCE?

In *Wade v. United States*, 504 U.S. 181 (1992), this Court held that federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion pursuant to 18 U.S.C. sec. 3553(e) and 5K1.1 of the United States Sentencing Guidelines (hereinafter U.S.S.G.) if the court finds that the refusal was based on an unconstitutional motive. However, this Court in *Wade* further indicated that where a prosecutor promises, pursuant to a plea agreement, to file a 5K1.1 motion, the principles announced in *Santobello v. New York*, 404 U.S. 257 (1971) are still controlling. In fact, with the exception of the Eleventh Circuit in this case and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993), other circuits addressing this issue have assumed or specifically decided that

the contract principles set forth in *Santobello*, and approved in *Wade* are applicable where the government has entered into a plea agreement with the defendant to file a 5K1.1 motion based on the defendant's cooperation. Therefore, under such circumstances, the District Court is obliged to review the government's refusal to fulfill its promise and make the motion, just as it would review any other alleged breach of a plea agreement.

In this case, the court below has erroneously expanded the limited principles set forth by this Court in *Wade* to circumstances where the obligation placed on the government to file a 5K1.1 motion for substantial assistance is superseded by a plea agreement between the parties.[2] Unfortunately, this Court in *Wade* never specifically needed to reach the situation as presented in this case where there exists a written plea agreement between the parties, and, in that agreement, the government has still attempted to retain the discretion of whether or not to file a substantial assistance motion. Certainly, this Court in *Wade* could not have meant to limit the defendant to the enforcement of a written plea agreement *only* if he can allege an unconstitutional motive on the part of

---

[2] U.S.S.G. section 5K1.1 is based on substantial assistance before sentencing, while Rule 35(b) is based on substantial assistance after sentencing. *United States v. Gangi*, 45 F.3d 28 (2d Cir. 1995). Several Circuits have explicitly determined that Rule 35(b) should be interpreted in light of section 5K1.1. *See United States v. Perez*, 955 F.2d 34, 35 (10th Cir. 1992); *United States v. Doe*, 940 F.2d 199, 203 n.7 (7th Cir.), *cert. denied*, 502 U.S. 869 (1991). In the case at bar, Ortega's claims are based on the government's failure to file the requisite substantial assistance motion after sentencing.

the prosecutor, since such limitation would, effectively, render the government's promise completely illusory.

Thus, traditional contract principles, that have not been abrogated, overruled or diminished in any way by this Court's decision in *Wade v. United States* should continue in full force and effect, thereby imposing on the government a duty of good faith and fair dealing. In essence, the decisions of the court below in this case and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993) have misinterpreted the holding of this Court in *Wade*, which has completely deprived the Petitioner, Jose Miguel Ortega-Acosta of his constitutional right to a fair judicial proceeding.

In the opinion below, the court determined that the district court was correct in declining to conduct an evidentiary hearing on the Petitioner's motion to compel specific performance of his plea agreement, since, under the terms of the plea agreement, the prosecutor retained discretion over whether or not to move for a reduction of sentence on the Appellant's behalf, and, in accordance with the decision in *Wade v. United States*, review of this discretion can *only* be had where the Appellant has alleged that the prosecutor's actions were premised on an unconstitutional motive. The court then determined that ORTEGA's claims were foreclosed by their decision in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993), and affirmed the district court's determination.

Forney was wrongly decided. This Court in *Wade* did not extend the requirements of alleging an unconstitutional motive on the part of the prosecutor to situations where there exists a bargained-for exchange between the

parties. Indeed, in *Wade*, a case not involving a plea agreement, this court recognized that its decision may have been different if a written plea agreement was involved:

> Wade concedes . . . that section 3553(e) imposes the condition of a Government motion upon the district court's authority to depart, . . . and he does not argue otherwise with respect to a section 5K1.1. He does not claim that the Government-motion requirement . . . is superseded in this case by any agreement on the Government's behalf to file a substantial-assistance motion, *cf. Santobello v. New York*, 404 U.S. 257, 262-263, 92 S.Ct. 495, 498-499, 30 L.Ed.2d 427 (1971); *United States v. Conner*, 930 F.2d 1073, 1075-77 (CA4), *cert. denied*, 502 U.S. ___, 112 S.Ct. 420, 116 L.Ed.2d 440 (1991).

Id. at 1843.[3]

Thus, the court below in *United States v. Ortega-Acosta*, Case No. 5122 and in *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993) have not only misconstrued the limited holding of this Court in *Wade*, but have caused a conflict between *Wade* and *Santobello v. New York*, 404 U.S. 257 (1971) in cases involving written plea agreements and a prosecutor's promise pursuant to such an agreement to file a motion for reduction of sentence based on a defendant's substantial assistance. Principles of good faith, fair

---

[3] Indeed, the Petitioner would submit that this Court's requirement of claiming an unconstitutional motive by a prosecutor in refusing to move for a downward departure, as stated in *Wade*, is only a small "loophole" that has been left open for possible judicial review, but only where there is no written agreement between the parties.

dealing and fairness of the proceedings must still apply, consistent with general contract principles, requiring an evidentiary review of the conduct of the parties and a judicial determination in the contract between the parties has been breached by either side. If judicial review under such circumstances where there exists a written plea agreement between the parties were only required where the defendant has alleged an unconstitutional motive by the prosecutor, the purpose and intent of plea agreements would be rendered moot, and all promises illusory.

II.

WHETHER THE COURT BELOW AND IN *UNITED STATES V. FORNEY*, 9 F.3D 1492 (11TH CIR. 1993) HAVE MISCONSTRUED THE PRINCIPLES SET FORTH BY THIS COURT IN *WADE V. UNITED STATES*, 504 U.S. 181 (1992), THEREBY REQUIRING THIS COURT TO REVIEW ITS EARLIER DECISION IN *WADE* AND CLARIFY ITS APPLICATION OF THE PRINCIPLES IN THAT CASE, WHERE EXTENDING *WADE* TO CASES INVOLVING PLEA AGREEMENTS WOULD EFFECTIVELY CONFLICT WITH EARLIER DECISIONS OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEALS INTERPRETING *WADE*, WHICH HAVE CONSISTENTLY HELD THAT PLEA AGREEMENTS ARE GOVERNED BY CONTRACT PRINCIPLES, AND, THEREFORE, IN ORDER TO OBTAIN JUDICIAL REVIEW, THE DEFENDANT NEED NOT ALLEGE AN UNCONSTITUTIONAL MOTIVE BY A PROSECUTOR IN HIS REFUSAL TO FILE A SUBSTANTIAL ASSISTANCE MOTION BUT CAN ALLEGE THAT THE PROSECUTOR ACTED IN BAD FAITH OR THAT HIS ACTIONS WERE NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT END?

The law is patently clear that a defendant who enters a guilty plea waives numerous constitutional rights.

Boykin v. Alabama, 395 U.S. 238 (1969). These rights include the right to a jury trial, the right to call witnesses in his behalf, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination. *Boykin* at 243; *Brady v. United States*, 397 U.S. 742, 747-48 (1970). Guilty pleas have been described as "perhaps the supreme instance of waiver known to our system of justice, one by which all . . . trial rights and safeguards are voluntarily foregone." *United States v. Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc).

More significant, of course, is where the defendant and the government have entered into a written plea agreement, a contract obligating both sides to perform certain tasks, this in exchange for the defendant's waiver of these above-enumerated constitutional rights. The government's efforts to impose their own self-determined discretion to file or not file a substantial assistance motion in a plea agreement must still be limited by the implied obligation to act in good faith and fair dealing.

In *Santobello v. New York*, 404 U.S. 257 (1971) this Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled". 404 U.S. at 262. As plea agreements are government by contract principles, each party bears a duty of good faith and fair dealing in performing its obligations. *Restatement (Second) of Contracts* sec. 205 (1981). Although there are many advantages of the plea bargaining process and of disposing of charges without the necessity of a trial, the defendant's constitutional rights remain paramount, and, there must be ". . . fairness in securing [a plea] agreement

between an accused and a prosecutor." *Santobello* at 261. A plea agreement must be construed in light of the fact that it constitutes a waiver of "' . . . substantial constitutional rights' requiring that the defendant be adequately warned of the consequences of the plea." *United States v. Jeffries*, 908 F.2d 1520 at 1523 (11th Cir. 1990).

By effectively limiting judicial review of a prosecutor's refusal to file a motion for reduction of sentence where there is a plea agreement between the parties where the government has still maintained a certain amount of discretion to file a motion for reduction only to circumstances where the defendant has alleged that the prosecutor acted with an unconstitutional motive, the court below in this case and in *Forney* have effectively rendered all plea agreements containing such provisions illusory. Further, the decision below and in *Forney* have created a direct conflict with this Court, and between other Circuit Court of Appeals, and has also created a conflict between this Court in *Wade v. United States*, 504 U.S. 181 (1992) and *Santobello v. New York*, 404 U.S. 257 (1971). Despite the government's efforts in such agreements to enhance their powers of discretion, plea agreements must still be governed by contract principles of good faith and fair dealing. *Forney* concluded that when a plea agreement grants the government the sole discretion to determine whether to file a substantial assistance motion, the government has no duty to act in good faith, and its refusal to file a motion can only be reviewed for an unconstitutional motive. *Forney* flies in the face of fairness, and denies a defendant his expectations that the government will file a motion if he substantially assists. Such a result cannot stand, as it is clearly inconsistent

with well-established principles of this Court and other Circuit Court of Appeals.[4]

The decision of the Court of Appeals is inconsistent with the decisions of other Court of Appeals which have consistently declined to interpret *Wade* to require proof of an unconstitutional motive where there is a plea agreement between the parties even when the government has retained discretion to file a substantial assistance motion. And, in fact, these Courts have determined that there need only be a showing either of bad faith or that the prosecutor has acted without a rational basis for a defendant to obtain judicial review of a prosecutor's refusal to file a substantial assistance motion. *See, e.g. United States v. Carrera*, 49 F.3d 105 (3d Cir. 1995); *United States v. Catalucci*, 36 F.3d 151 (1st Cir. 1994) ("[W]e cannot see how under any plausible standard of review the district court could have found that the prosecutor acted in bad faith or without rational basis"), *United States v. Profeta*, 995 F.2d 306 (D.C. Cir. 1993) (courts may review for good

---

[4] In *United States v. Evans*, 49 F.3d 109 (3d Cir. 1995), the Third Circuit Court of Appeals stated that:

> [w]e conclude that the government's actions in refusing to file a 5K1.1 motion were proper. Where, as here, the government is not controlled by an agreement, it has the power, but not the duty to file a 5K1.1 motion. *Wade v. United States*, 504 U.S. at 184-85, 112 S.Ct. at 1843 . . .

49 F.3d at 108.

Implicit in this holding is the Court's recognition that the government maintains a duty to file a substantial assistance motion where there exists a plea agreement between the parties, and, further, that this Court's decision in *Wade* is not interpreted to apply to cases where there exists such an agreement.

faith); *United States v. Robinson*, 978 F.2d 1554, 1569 (10th Cir. 1992) (same), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1855 (1993) (same); *United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992) (when a cooperation agreement allows for a substantial assistance motion contingent on government's subjective evaluation and discretion of defendant's efforts, the district court may review determination where the prosecutor based its decision on impermissible considerations, or *whether the prosecutor has made its determination in good faith.*) (emphasis in original).

It is imperative that this Court review this case. Clearly, a clarification of this Court's earlier decision in *Wade* may be in order to avoid further misconstruction and misapplication of the principles in *Wade*, and further to avoid a clear conflict between the established principles of this Court in *Wade* and in *Santobello*. The government should be compelled, at the very least, to act in good faith where there exists an agreement between the parties, and the defendant, in relying on this agreement and the promises set forth therein, forgoes valuable constitutional rights, and further incurs the potential of great risk to themselves and their family by cooperating with the government.

This case provides an opportunity for this Court to clarify its earlier decision in *Wade*, recognizing the continuing validity of *Santobello v. New York*, 404 U.S. 257 (1971) and its progeny. On its merit, the holding of the Court of Appeals in this case and in *Forney* are at odds with this Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), and, in the interest of effective administration of the criminal justice system of both the state and

federal governments, resolve the conflict created by the decision of the Eleventh Circuit.

III.

WHETHER THE PETITIONER HAD STILL MADE THE REQUISITE SHOWING UNDER *WADE v. UNITED STATES*, ENTITLING HIM TO SPECIFIC PERFORMANCE OF HIS PLEA AGREEMENT, WHERE HE ALLEGED THAT THE PROSECUTOR ACTED IN BAD FAITH IN NOT FILING THE SUBSTANTIAL ASSISTANCE MOTION OR WHERE THE PROSECUTOR'S ACTIONS WERE NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT END?

The Petitioner clearly made the requisite showing of the prosecutor acting in bad faith or that the prosecutor's actions were not rationally related to any legitimate government end when refusing to file a motion to reduce his sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure.

Even under *Wade*, ORTEGA alleged facts sufficient to trigger a review by the District Court, where he argued in his motion to compel specific performance of the plea agreement that the prosecutor's actions in refusing to file a motion was not rationally related to any legitimate government end. The Petitioner argued that the prosecutor's motive in refusing to file a Rule 35 motion was vindictive, and it was clear that her refusal to file the motion was only because ORTEGA had attempted to testify in his family's case and because his family filed a motion to dismiss the indictment in that case based on governmental misconduct.

Jose Miguel Ortega-Acosta was entitled to a determination by the Appellate Court that the prosecutor acted in bad faith or without a rational purpose in refusing to file a motion to reduce his sentence after he provided substantial assistance to the government. He bargained away his most precious constitutional rights. This court cannot deprive the Petitioner of the judicial fairness to which he is entitled, and should grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated, the Petitioner requests that this Court grant its petition for a writ of certiorari and that it herein resolve the issues raised.

Respectfully submitted,

DANIEL H. FORMAN, P.A.
DANIEL H. FORMAN, ESQ.
Attorney for Petitioner

MARISA TINKLER MENDEZ, P.A.
MARISA TINKLER MENDEZ, ESQ.
On Brief for Petitioner

DANIEL H. FORMAN, ESQ.
Counsel of Record for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-5122

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE MIGUEL ORTEGA,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

---

(Filed July 13, 1995)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and BLACK, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-5122
Non-Argument Calendar

D. C. Docket No. 87-818-CR-EBD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE MIGUEL ORTEGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 12, 1995)

Before KRAVITCH and BLACK, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

In 1991, Jose Miguel Ortega-Acosta ("Appellant") entered into a written plea agreement, pleading guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C.A. § 846 (West 1981 & Supp. 1995), knowingly failing to appear before the United States District Court pursuant to his pre-trial release, in violation of 18 U.S.C.A. § 3146 (West Supp. 1995), and conspiring to

import cocaine into the United States, in violation of 21 U.S.C.A. § 963 (West 1981 & Supp. 1995). The district court accepted the plea agreement and imposed concurrent sentences of ten years' and 262 months' imprisonment for the conspiracies to distribute and to import, respectively, and a consecutive sentence of two years' imprisonment for failure to appear.

In June 1992, Appellant filed a motion to compel specific performance of his plea agreement, contending that the government acted in bad faith by refusing to file a Fed. R. Crim. P. 35 motion for a reduction of his sentence for his substantial assistance. The district court declined to conduct an evidentiary hearing, finding that, under the terms of the plea agreement, the prosecutor retained discretion over whether to move for a reduction of sentence on Appellant's behalf and that, under the Supreme Court's holding in *Wade v. United States*, 504 U.S. 181 (1992), a court can only review the prosecutor's exercise of such discretion where there is an allegation that the prosecutor had an unconstitutional motive. Because Appellant did not allege any unconstitutional motive on the part of the prosecution, the district court denied him relief.

On appeal, Appellant contends (1) that the district court abused its discretion in refusing to grant an evidentiary hearing, and (2) that the government should be compelled to file a Rule 35 motion. Appellant's contentions are foreclosed by this Court's decision in *United States v. Forney*, 9 F.3d 1492, 1500-03 (11th Cir. 1993). Accordingly, we AFFIRM.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-0818-CR-DAVIS

UNITED STATES OF AMERICA,

v.

JOSE MIGUEL ORTEGA.

ORDER

(Filed October 27, 1992)

THIS MATTER is before the court on the Defendant's motion to compel specific performance of a plea agreement or for dismissal of the indictments.

BACKGROUND

On separate dates, three indictments were filed against Defendant Jose Miguel Ortega – *United States v. Tania Diaz-Martinez*, No. 88-505-CR-DAVIS, *United States v. Jose Miguel Ortega*, No. 87-818-CR-DAVIS, and *United States v. Calixto Milian*, No. 90-561-CR-DAVIS. Assistant United States Attorney Karen Rochlin is assigned to these cases. The attorneys for the Defendant are Simon Steckel and Ruben Oliva.

One plea agreement resolved all three cases. In part, the plea agreement required the Defendant's cooperation in other criminal investigations. The agreement indicated that should the government find an appropriate level of cooperation by the Defendant, the government would file a motion pursuant to Title 18, United States Code, Section 3553(e) and Section 5K1.1 of the Sentencing Guidelines for a reduction of sentence. ("Steckel") and Ruben Oliva, Esq. ("Oliva").

The parties vigorously dispute the factual basis of this motion. The Defendant maintains that he has cooperated with federal agents. Specifically, the Defendant claims that Special Agent Matthew Leary ("Leary") and Assistant United States Attorneys Mary King and Mike Mulaney have discussed this matter with Steckel. The Defendant maintains that in the course of these discussions, the government indicated that the Defendant would be of assistance and that it had no reason to believe that the Defendant was withholding information. Additionally, the Defendant contends that Agent Leary stated that the Defendant's aid was significant and would be followed with a filing of a Rule 35 motion for a sentence reduction.

According to the government's version of the facts, the Defendant was given every opportunity to cooperate, but failed to sufficiently do so. The government maintains that Agent Leary, who conducted the majority of the debriefings with the Defendant, insists that the Defendant was not completely honest and may be withholding information. Agent Leary claims he expressed this concern to the Defendant's attorney, Oliva, and that Oliva acknowledged Leary's observations.

Moreover, the plea agreement states that the Defendant may be required to work in an undercover capacity. Agent Leary maintains that on more than one occasion, the Defendant rejected requests to work undercover. Consequently, Agent Leary and other federal agents were unwilling to hold the Defendant in Miami for further assistance in their cases.

The Defendant, however, asserts that the government has obstructed and will continue to obstruct his efforts to cooperate. On April 16, 1991, Steckel informed Judge Ryskamp that the Defendant would testify in *United States v. Raul Gonzalez, Josefina Ortega, and Marisol Gonzalez*, No. 90-715-CR-ARONOVITZ (RYSKAMP). Steckel also represents two of the Defendant's family members that case. AUSA Rochlin, who is also assigned to case 90-715-CR-ARONOVITZ (RYSKAMP), alleges that subsequent to the above hearing, she learned that the Defendant would testify in a manner which would be untruthful. Any untruthful testimony by the Defendant could lead to his impeachment and negatively affect his plea agreement. AUSA Rochlin discussed her concerns with the Defendant's counsel. The interpretation of this conversation has been construed differently by both parties.

The Defendant refers to this conversation as evidence of obstruction of his efforts to cooperate, which would frustrate his attempts to have his sentence reduced. Additionally, the Defendant claims that Rochlin also has obstructed the Defendant's attempts to assist other government prosecutors. Finally, the Defendant maintains that Rochlin will not file a Rule 35 motion on the Defendant's behalf because of what she perceives to be insufficient cooperation.

Based upon the Defendant's interpretation of the government's actions, he asks this court to compel specific performance of the plea agreement or to dismiss all indictments. The Defendant claims that the government acted in bad faith when it refused to make a Rule 35 motion for a reduction of sentence on his behalf.

The government's response indicates an absence of evidence regarding the Defendant's cooperation and that any charges of obstruction are without merit. The government's review of the Defendant's case revealed that the Defendant failed to provide information which resulted in any arrests, seizures, indictments, forfeitures or convictions. Moreover, the government claims it has knowledge that the Defendant withheld information or was not candid when cooperation was requested. The government has concluded that the Defendant has not adequately cooperated. Therefore, the government's position is that a Rule 35 motion is unwarranted.

STANDARD OF REVIEW

Title 18, United States Code, Section 3553(e) and 5K1.1 of the Sentencing Guidelines, indicates that a Defendant who has substantially assisted the government in the investigation or prosecution of individuals engaged in illegal acts should be granted downward departure from the sentencing guidelines, pursuant to Rule 35(b). If the evidence indicates that the Defendant substantially assisted the government and that the government failed to comply with the plea agreement, relief may be granted in the form of a motion to compel specific performance of plea agreement or to withdraw guilty verdict. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Yesil*, 968 F.2d 1122 (11th Cir. 1992).

Importantly, the government has the power, but not a duty, to file a Rule 35 motion when the Defendant has substantially assisted. *Wade v. United States*, 112 S.Ct. 1840, 1844 (1992). Furthermore, a Rule 35 motion only

may be considered upon a government motion, even if the government allegedly acted in bad faith. *U.S. v. Willis*, 956 F.2d 248, 251 (11th Cir. 1992). Since the government has the discretion to decide the appropriateness of a sentence reduction, *United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1463 (11th Cir. 1991), a Defendant should not expect a sentencing reduction as an automatic gesture, even if a plea agreement provides for a reduction if the Defendant cooperates. *Id.*

The Supreme Court has indicated that federal district courts have the authority to evaluate the government's refusal to file a Rule 35 motion, *if* the refusal is based on an unconstitutional motive. *Wade*, 112 S.Ct. at 1843-44. In *Wade*, the court required that, in order to invoke judicial review, a Defendant must allege that the government had unconstitutional motives in refusing to file the Rule 35 motion. *Id.*

DISCUSSION

In the instant case, the parties' arguments are based on facts which are in dispute. The Defendant contends that he substantially assisted the government pursuant to the plea agreement. The government claims just the opposite.

However, the court finds that resolution of this factual dispute is not necessary to the court's decision on this motion. Courts in this Circuit are bound by the rule that a mere claim that the Defendant provided assistance is not sufficient to permit relief, discovery, or an evidentiary hearing. *Wade*, 112 S.Ct. at 1843-44. Additionally, *Wade* holds that the government's refusal to file a Rule 35

motion may only be reviewed by a federal district court if it finds an unconstitutional motive as the basis for the refusal. *Id.* at 1844. In the instant case, the Defendant has made no such allegation and the court finds that the facts do not indicate any unconstitutional motive by the government.

The court finds that, in the absence of any unconstitutional motive by the government, the Defendant's claims regarding his alleged cooperation are irrelevant. Furthermore, the government is under no obligation to file a Rule 35 motion, regardless of whether the Defendant cooperated. Accordingly, it is

ORDERED AND ADJUDGED that the motion is DENIED.

DONE AND ORDERED in Chambers, at Miami, Florida, this 27 day of October, 1992.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Counsel of record

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA V. JOSE MIGUEL ORTEGA-ACOSTA Reg. No. 16584-004 (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** **(For Offenses Committed On or After November 1, 1987)** **Case Number:** 90-561-CR-DAVIS-4 Simon T. Steckel, Esq. Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) One

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
Title 21, U.S.C. Section 963.	Conspiracy to Import Cocaine.	08/06/90	1

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[X] Count(s) Two (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00 , for count(s) One , which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
261-97-2111

Defendant's Date of Birth:
05/29/58

Defendant's Mailing Address:

c/o MCC, 15801 S.W.
137th Avenue
Miami, Florida 33177

Defendant's Residence Address:

SAME AS ABOVE

June 18, 1991
Date of Imposition of Sentence

/s/ Edward B. Davis
Signature of Judicial Officer

EDWARD B. DAVIS,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

June 19, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two Hundred sixty-two (262) months, as to Count 1, it being further

ORDERED that the sentence of incarceration imposed as to Case No. 90-561-CR-DAVIS shall run concurrently to

the sentence of incarceration imposed as to Case No. 87-818-CR-DAVIS, also imposed this date, it being further

ORDERED that the Defendant shall receive credit for time served in federal custody awaiting final disposition of this case.

[X] The court makes the following recommendations to the Bureau of Prisons: an institution in the State of Florida.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

_ a.m.
_ at _____ p.m. on _____.
_ as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on _____.
_ as notified by the United States marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years, as to Count 1.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[XX] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XX] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal state or local crime in addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

JOSE MIGUEL ORTEGA-ACOSTA
Reg. No. 16584-004

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 88-505-CR-DAVIS-1

Simon T. Steckel, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) Two

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
Title 18, U.S.C. Section 3146.	Bail Jumping.	01/05/88	2

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[X] Count(s) One (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) Two, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
261-97-2111

Defendant's Date of Birth:
05/29/58

Defendant's Mailing Address:

c/o MCC, 15801 S.W. 137th Avenue
Miami, Florida 33177

Defendant's Residence Address:

SAME AS ABOVE

June 18, 1991
Date of Imposition of Sentence

/s/ Edward B. Davis
Signature of Judicial Officer

EDWARD B. DAVIS,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

June 19, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-four (24) months, as to Count 2, it being further

ORDERED that the period of incarceration imposed as to Case No. 88-505-CR-DAVIS shall run consecutively to the sentence of incarceration imposed as to Case No. 90-561-CR-DAVIS, also imposed this date, it being further

ORDERED that the Defendant shall receive credit for time served in federal custody awaiting final disposition of this case.

[X] The court makes the following recommendations to the Bureau of Prisons: an institution in the State of Florida.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

_ a.m.
_ at _____ p.m. on _____.
_ as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on _____.
_ as notified by the United States marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years, as to Count 2, it being further

ORDERED that the term of supervised release imposed as to Case No. 88-505-CR-DAVIS shall run concurrently to the term of supervised release imposed as to Case No. 90-561-CR-DAVIS, also imposed this date.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[XX] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XX] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal state or local crime in addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) Three as follows:

Payable to the Clerk, U.S. District Court, Southern District of Florida, Miami, Florida, Immediately.

IT IS FURTHER ORDERED THAT counts One, Two and four are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends: an institution in the State of Florida.

June 18, 1991
Date of Imposition of Sentence

/s/ Edward B. Davis
Signature of Judicial Officer

Edward B. Davis, U.S. District Judge
Name and Title of Judicial Officer

June 19, 1991
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with certified copy of this Judgment in a Criminal Case.

/s/ _____
United States Marshal

By /s/ _____
Deputy Marshal

_____

United States District Court

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA
V.

JUDGMENT IN A CRIMINAL CASE

JOSE MIGUEL ORTEGA-ACOSTA
Reg. No. 16584-004
15801 S.W. 137th Avenue
Miami, Florida 33177
S.S. #: 261-97-2111
DOB: 05/29/58
(Name and Address of Defendant)

Case Number:
87-818-CR-DAVIS-3

Simon T. Steckel, Esq.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[X guilty _ nolo contendere] as to count(s) Three. and X not guilty as to count(s) One, Two and Four.

THERE WAS A:

[X finding _ verdict] of guilty as to count(s) Three.

THERE WAS A:

[_ finding _ verdict] of not guilty as to count(s) _____.

_ judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Count 3: Conspiracy to Distribute Cocaine, on or about October 28, 1987, in violation of Title 21, U.S.C. Section 846.

IT IS THE JUDGMENT OF THIS COURT THAT: the Defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of Ten (10) years, as to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that the Defendant shall receive credit for time served in federal custody awaiting final disposition of this case.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

KER:mr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-818-Cr-DAVIS
88-505-Cr-DAVIS
90-561-Cr-DAVIS
(Filed Apr. [illegible], 1991)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE MIGUEL ORTEGA,

Defendant.

_____/

PLEA AGREEMENT

The United States of America and Jose Miguel Ortega (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to Count III of the indictment in *United States v. Tania Diaz-Martinez et al.*, No. 87-818-Cr-DAVIS, which count charges the defendant with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §846.

2. The United States agrees to dismiss the remaining counts of the indictment in *United States v. Tania Diaz-Martinez et al.*, No. 87-818-Cr-DAVIS, with respect to the defendant, after sentencing.

3. The defendant agrees to plead guilty to Count II of the indictment in *United States v. Jose Miguel Ortega,*

No. 88-505-Cr-DAVIS, which count charges the defendant with knowingly failing to appear before the United States District Court for the Southern District of Florida, as required by the conditions of his pre-trial release, in violation of 18 U.S.C. §3146.

4. The United States agrees to dismiss the remaining count of the indictment in *United States v. Jose Miguel Ortega*, No. 88-505-Cr-DAVIS, with respect to the defendant, after sentencing.

5. The defendant agrees to plead guilty to Count I of the indictment in *United States v. Calixto Milian, et al.*, No. 90-561-Cr-DAVIS(s), which count charges the defendant with conspiring to import cocaine into the United States from a place outside thereof, in violation of 21 U.S.C. §963.

6. The United States agrees to dismiss the remaining counts in the indictment in *United States v. Calixto Milian, et al.*, No. 90-561-Cr-DAVIS, with respect to the defendant, after sentencing.

7. The defendant agrees that he shall cooperate fully with the Office of the United States Attorney for the Southern District of Florida, the United States Drug Enforcement administration (DEA), the United States Customs Service, and such other law enforcement agencies as either of the foregoing may require, by:

(a) providing truthful information and testimony concerning violations of the narcotics laws of the United States or other unlawful activity of which the defendant may be aware;

(b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings as may be required by the Office of the United States Attorney for the Southern District of Florida; and

(c) working in an undercover role to contact and negotiate with sources of cocaine and other controlled substances known to the defendant, under the supervision and guidance of DEA or Customs agents and Assistant United States Attorneys.

8. The United States reserves the right to evaluate the nature and extent of the defendant's cooperation and to advise the court of the nature and extent of such cooperation at the time of sentencing. If, in the judgment of the United States, the circumstances of the defendant's cooperation and applicable legal authority, if any, warrant a recommendation for concurrent sentences or reduction below the level established by statute as the minimum sentence and departure by the court from the guideline sentence, the government shall make a motion pursuant to Title 18, United States Code, Section 3553(e), and 5K1.1 of the Sentencing Guidelines, stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

9. The United States reserves the right to make a recommendation as to the quality and quantity of punishment, including whether or not to make a recommendation for the imposition of concurrent sentences, and, subject to the provision of paragraph 8 of this Agreement, reserves the right to inform the court and the Probation

Department of all facts pertinent to the sentencing process, including all relevant information concerning the defendant and his background.

10. The defendant understands and agrees that the court is under no obligation to grant the government's motion referred to in paragraph 8 of this Agreement; that the court may impose any sentence authorized by law; and that the defendant may not withdraw his plea solely as a result of the sentence imposed. The defendant understands and agrees that if the Court does not grant the motion referred to in paragraph 8, it must impose the following penalties:

a. with respect to Count III in *United States v. Tania Diaz-Martinez et al.*, No. 87-818-Cr-DAVIS, the Court must impose a minimum term of imprisonment of 10 years and may impose a maximum term of life imprisonment, followed by a term of supervised release. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to $4,000,000.00.

b. with respect to Count II in *United States v. Jose Miguel Ortega*, No. 88-505-Cr-DAVIS, the court may impose a maximum term of imprisonment of up to 10 years, and such term of imprisonment must be consecutive to the sentence of imprisonment for any other offense. In addition to a term of imprisonment and supervised release, the court may impose a fine of up to $250,000, and may order restitution.

c. with respect to Count I in *United States v. Calixto Milian et al.*, No. 90-561-Cr-DAVIS, the court must impose a minimum term of imprisonment of 10 years and

the court may impose a maximum term of life imprisonment, followed by a term of supervised release. In addition to a term of imprisonment and supervised release, the court may impose a fine of up to $4,000,000.00.

11. The defendant understands and agrees that, in addition to any sentence imposed under paragraph 9 of this agreement, a special assessment in the amount of $150.00 will be imposed.

12. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements or understanding between the parties.

Respectfully submitted,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

4/16/91
(Date)

BY: /s/ Karen E. Rochlin
KAREN E. ROCHLIN
ASSISTANT UNITED
STATES ATTORNEY

4-16-91
(Date)

/s/ Ruben Oliva
RUBEN OLIVA
ATTORNEY FOR THE
DEFENDANT

4-16-91
(Date)

/s/ Simon Steckel
SIMON STECKEL
ATTORNEY FOR THE
DEFENDANT

_____
(Date)

/s/ Jose Miguel Ortega-Acosta
DEFENDANT

Certified to be a true and
correct copy of the original.
T.G. Cheleotis, Clerk
U.S. District Court
Southern District of Florida

By /s/ T. G. Cheleotis
Deputy Clerk

Date 4/[illegible]/91

KER:kg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-561-CR-DAVIS(s)
21 USC § 963
21 USC § 952(a)
21 USC § 959(a)(1) and 2
18 USC 2

UNITED STATES OF AMERICA

vs.

SUPERSEDING INDICTMENT

CALIXTO MILIAN,
OLAYA MILIAN,
GILBERTO RUIZ
and
JOSE MIGUEL ORTEGA-ACOSTA.
_____/

The Grand Jury charges that:

COUNT I

From on or about April 1, 1990, to on or about August 6, 1990, at Miami, Dade County, in the Southern District of Florida, the defendants,

CALIXTO MILIAN,
OLAYA MILIAN,
GILBERTO RUIZ,
and
JOSE MIGUEL ORTEGA-ACOSTA,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons unknown to the Grand Jury to import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); all in violation of Title 21, United States Code, Section 963.

COUNT II

From on or about April 1, 1990, to on or about August 6, 1990, at Jamaica, the defendants,

CALIXTO MILIAN,
OLAYA MILIAN,
GILBERTO RUIZ,
and
JOSE MIGUEL ORTEGA-ACOSTA,

knowingly and intentionally did distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, intending that such substance would be imported into the Southern District of Florida in the United States, in violation of Title 21, United States Code, Section 959, and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Illegible
FOREPERSON

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

WFJ:ded

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 88-0505 CR-SPELLMAN
18 U.S.C. § 401(3)
18 U.S.C. § 3146

UNITED STATES OF AMERICA

vs. INDICTMENT

JOSE MIGUEL ORTEGA

_____/

The Grand Jury charges that:

COUNT I

On or about January 5, 1988, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE MIGUEL ORTEGA,

knowingly and willfully, and in disobedience to and resistance of a lawful order of the United States District Court for the Southern District of Florida, given at Miami, Florida, on or about November 23, 1987, in *United States v. Jose Miguel Ortega*, Case No. 87-818-CR-SPELLMAN, did fail to appear for trial as ordered by the Court; in violation of Title 18, United States Code, Section 401(3).

COUNT II

On or about January 5, 1988, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE MIGUEL ORTEGA,

having previously been charged with violations of Title 21, United States Code, Sections 846 and 841(a)(1), and Title 18, United States Code, Section 2, that is, conspiracy to possess with intent to distribute and possession with intent to distribute more than five kilograms of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride, a Schedule II narcotic controlled substance, offenses punishable by imprisonment for a term of more than fifteen years and having been released by the United States District Court for the Southern District of Florida pursuant to Title 18, United States Code, Section 3141 *et seq.* in *United States v. Jose Mighel Ortega*, Case No. 87-818-Cr-SPELLMAN, did knowingly fail to appear before said Court as required by the conditions of his release, in that the defendant failed to appear for trial as ordered on November 23, 1987 by said Court; all in violation of Title18, United States Code, Section 3146.

A TRUE BILL

/s/ Barbara P. Nanney
FOREPERSON

/S/ sig. illegible
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

/s/ William F. Jung
WILLIAM F. JUNG
ASSISTANT UNITED STATES ATTORNEY

LAS:DED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NO. 87-818 CR-SPELLMAN
21 USC 846
21 USC 841(a)(1)
18 USC 2

UNITED STATES OF AMERICA

vs.

TANIA DIAZ-MARTINEZ,
JOSE FREDDY ZAMUNDIO and
JOSE MIGUEL ORTEGA

_____/

The Grand Jury charges that:

COUNT I

From on or about October 22, 1987 and continuing through October 28, 1987, in Miami, Dade County, Florida, in the Southern District of Florida, the defendants,

TANIA DIAZ-MARTINEZ
and
JOSE FREDDY ZMEDIO.

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons unknown to the Grand Jury to [ILLEGIBLE] an offense against the United States, that is, to violate Title 21, United States Code, Section 841(a)(1).

It was the purpose and object of this conspiracy knowingly and intentionally to distribute a Schedule II

narcotic controlled substance, that is, a quantity of cocaine.

It is further charged that the defendants conspired to distribute more than five hundred (500) grams of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride.

All in violation of Title 21, United States Code, Section 846.

COUNT II

On or about October 28, 1987, in Miami, Dade County, Florida, in the Southern District of Florida, the defendants,

TANIA DIAZ-MARTINEZ
and
JOSE FREDDY ZAMUDIO,

did knowingly and intentionally distribute a controlled substance, that is, a quantity of cocaine, a Schedule II narcotic controlled substance.

It is further charged that the defendants distributed at least five hundred (500) grams of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride, a Schedule II narcotic controlled substance.

All in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about October 28, 1987, in Miami, Dade County, Florida in the Southern District of Florida, the defendants,

JOSE FREDDY ZAMUDIO
and
JOSE MIGUEL ORTEGA,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons unknown to the Grand Jury to commit an offense against the United States, that is, to violate Title 21, United States Code, Section 841(a)(1).

It was the purpose and object of this conspiracy knowingly and intentionally to distribute a Schedule II narcotic controlled substance, that is, a quantity of cocaine.

It is further charged that the defendants conspired to distribute more than five (5) kilograms of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride.

All in violation of Title 21, United States Code, Section 846.

COUNT IV

On or about October 28, 1987, in Miami, Dade County, Florida, in the Southern District of Florida, the defendants,

JOSE FREDDY ZAMUDIO
and
JOSE MIGUEL ORTEGA,

did knowingly and intentionally possess with intent to distribute a controlled substance, that is, a quantity of cocaine, a Schedule II narcotic controlled substance.

It is further charged that the defendants possessed with intent to distribute in excess of five (5) kilograms of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride, a Schedule II narcotic controlled substance.

All in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL

_____
FOREPERSON Deputy

/s/ Leon B. Kellner
LEON B. KELLNER
UNITED STATES ATTORNEY

/s/ Leah A. Simms
LEAH A. SIMMS
ASSISTANT UNITED STATES ATTORNEY